

**BEFORE THE INDIANA  
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of J.S.,	)	
Petitioner,	)	
And	)	<b>Article 7 Hearing No. 1163.00</b>
Lafayette School Corporation,	)	
Greater Lafayette Area Special Services,	)	
Respondents	)	
	)	
Appeal from a Decision by	)	
Kristin L. Anderson, J.D.,	)	
Independent Hearing Officer	)	

FINDINGS OF FACT , CONCLUSIONS OF LAW, AND ORDERS

**Procedural History**

On May 15, 2000, Petitioner requested both a complaint investigation (see 511 IAC 7-30-2) and a due process hearing (see 511 IAC 7-30-3). The complaint issues involved allegations the Respondents failed to implement elements of a General Education Intervention (GEI) plan<sup>1</sup> and the evaluation proposed by the Respondents was inappropriate. The due process hearing request filed simultaneously addressed issues of appropriate seating assignment for Petitioner and specific time frames for activities contained in the GEI plan. An Independent Hearing Officer (IHO) was appointed on May 16, 2000. The IHO was provided with both of Petitioner’s letters and was also advised that Petitioner had a complaint investigation pending. The IHO was asked to determine whether she would subsume the complaint issues within the issues identified for hearing and to notify the Indiana Department of Education, Division of Special Education (DSE), as soon as practical of her decision so that the initial complaint investigation could be resumed or a new complaint investigation initiated.<sup>2</sup> The DSE, by

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<sup>1</sup> At the time of the request for a complaint investigation, 511 IAC 7-17 *et seq.* (“Article 7”) was not yet effective. Its predecessor was in place. Under the now-superseded regulations, GEI plans were addressed by 511 IAC 7-10-2 and involved considerably more detail and specified time frames than the current regulations.

<sup>2</sup> Under the federal regulations for the Individuals with Disabilities Education Act, issues typically denominated as “complaint issues” (that is, involving allegations of procedural non-compliance by a public agency) are investigated in Indiana by the Indiana Department of Education through its Division of Special

letter dated May 18, 2000, forwarded to the IHO a copy of Petitioner's letter of May 3, 2000, which initiated a complaint investigation styled as Complaint No. 1564.00. The issues in the May 3, 2000, letter are the same as the ones listed in the May 15, 2000, letter.<sup>3</sup>

The parties moved jointly for an extension of the initial timeline for the conduct of the hearing and the issuance of a written decision so that certain testing may be completed. The IHO issued an order on May 25, 2000, granting the motion, extending the timeline to July 17, 2000. A telephone pre-hearing conference was conducted on July 13, 2000. The following issues for hearing were determined at that time:

1. Whether the Petitioner is eligible for services under Article 7 for a Visual Impairment (VI)<sup>4</sup> or Other Health Impairment (OHI);
2. Whether the Petitioner is an individual with a disability for the purposes of Section 504 of the Rehabilitation Act of 1973 (Sec. 504); and
3. What educational program and services are appropriate for the Petitioner should she be found eligible under either Article 7 or Sec. 504.

The Respondents requested an extension of time, which was granted and incorporated into the Pre-Hearing Order issued that same date. The deadline for conducting the hearing and issuing a written decision was extended to August 14, 2000. The hearing was set to commence on July 27, 2000, and was, by parental request, to be open to the public. Deadlines for the exchange of witness lists and documents were established. The IHO also indicated in the Pre-Hearing Order that she would not assume jurisdiction over the issues raised in the Petitioner's letter of complaint (Complaint No. 1564.00). On or about July 14, 2000, the IHO informed the DSE that the complaint issues would not be assumed as issues for the due process hearing.

On July 19, 2000, Petitioner again filed with the DSE a letter of complaint, alleging in this instance that the evaluation recently completed was inadequate. The DSE forwarded the letter of complaint that same date to the IHO, asking the IHO to analyze the complaint issue and make a determination as to whether this issue should be assumed within the issues for the hearing.

At about this same time, the Respondents moved for an extension of time because of the unavailability of certain witnesses. On July 20, 2000, the IHO issued an "Amended Pre-

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Education. However, where a hearing has been requested, the complaint issues are forwarded to the IHO to determine whether the complaint issues are related to the hearing issues. If so, the IHO will assume responsibility for receiving evidence and testimony and issuing Findings of Fact, Conclusions of Law, and appropriate Orders regarding the complaint issues but within the framework of the hearing decision. See 34 CFR §300.661(c)(1).

<sup>3</sup> The Petitioner also initiated an earlier complaint, Complaint No. 1548.00, which determined the Respondents had failed to evaluate Petitioner in a timely fashion and had failed to include appropriate timelines for implementing and reviewing the Petitioner's GEI plan. Corrective action had been ordered. The Respondents were still within the timeline for implementing corrective action when the May 3, 2000, complaint was filed.

<sup>4</sup> The original Pre-Hearing Order referred to a "Hearing Impairment." This was corrected in the subsequent Pre-Hearing Order to indicate that the issue involved an alleged "Visual Impairment."

Hearing Order” that, *inter alia*, granted the motion for an extension of time, extending the deadline to August 28, 2000, and adjusting all internal deadlines as well. The hearing was reset for August 11, 2000. Petitioner also indicated that she did not wish to pursue any complaint issues through the hearing process. Sometime around the time the hearing was to begin, Petitioner moved for an extension of time due to emergency surgery of one of the members of Petitioner’s family.<sup>5</sup> The request for an extension was granted on August 22, 2000, resetting the hearing for September 25, 2000, with a deadline for issuing the written decision extended to October 9, 2000.

The hearing was conducted and completed on September 25, 2000. A final Pre-Hearing Conference was conducted prior to the taking of testimony. An additional issue was included by agreement of the parties. The additional issue is as follows:

4. Were the evaluations conducted by Respondent legally adequate under Article 7?

Respondents objected to certain of the documents offered by the Petitioner as irrelevant. These documents involved evaluations performed by Respondents of Petitioner’s twin brother. Petitioner had offered these documents as a means of demonstrating the inadequacy of Respondents’ evaluation procedures. The IHO excluded the documents, finding that they were irrelevant to the issues as stated. The hearing was open to the public and the Petitioner was in attendance. The parties had been previously advised of their hearing rights.

### **The Written Decision of the IHO**

The IHO’s written decision was issued on October 9, 2000. The following background information is reproduced verbatim from the IHO’s written decision.

The child is presently 12 years old [date of birth: Jan. 8, 1988] and is in a regular 6<sup>th</sup> grade class. She has an eye condition, progressive myopia, which may make it necessary for her to change the prescription lenses in her eyeglasses two to four times per year. She also has some accommodative insufficiency that makes shifting between near and distant vision more difficult than normal. In January 2000, the child was prescribed bifocals to make that shift more effective.

The School and Parents agreed upon a General Education Intervention (GEI) plan in April 1999. One of the accommodations in that plan specified that the child was to sit in the front of all her classes. At the recommendation of the child’s optometrist, the parties agreed that the child should be allowed to take breaks after 15 to 20 minutes of reading to give her eyes a rest and avoid headaches.

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<sup>5</sup> Exact time frames cannot be established. The IHO has not included with the record any of the requests for extensions of time, some of which apparently were in writing.

During the 1999-2000 school year, the parents became increasingly concerned that the child was not consistently receiving the preferential seating agreed upon in the GEI plan. In January 2000, the parents requested that the child be evaluated for a Learning Disability and disability based on "Other Health Impairment." The parents filed Complaint No. 1548.00 in March 2000 alleging that the School had failed to conduct an evaluation and convene a case conference committee within 40 instructional days of the request. The parents also alleged that the child's GEI plan was not being implemented as written. The complaint investigation determined that the School had violated both provisions of Article 7 and issued corrective orders to the School.

The case conference committee met on April 7, 2000, and determined that the child did not meet the eligibility requirements for either "Other Health Impairment" or "Learning Disability" as defined in Article 7. On May 15, 2000, the Indiana Department of Education received the Parents' request for a due process hearing under Article 7.

The IHO determined fourteen (14) Findings of Fact. The Petitioner's vision is presently corrected to 20/30. Although her vision may continue to worsen, there is no way of predicting when or how Petitioner's vision will change. At present, there are other options for correcting her vision, including the use of contact lenses. Petitioner has reported in the past that she experiences headaches when she reads for too long a period, when she does not sit in the front of the class, and when she is adjusting to changes in her eyeglass prescription.

Accommodations have been made to the general education classroom, including the use of "visual hygiene" breaks and preferential seating, the latter allowing the Petitioner to see visual presentations without significant difficulty. These accommodations alleviate the headaches somewhat, except for those related to adjustments to new prescription lenses. Petitioner has reported only one (1) severe headache during the first month of the 2000-2001 school year; however, Petitioner's mother reported these headaches were more numerous. Petitioner has not required any medical attention in school, nor has she had to leave school as a result of the headaches.

Petitioner's pediatrician has suggested over-the-counter analgesics for pain management, when necessary. The Parents report that Petitioner vomits analgesic tablets, but there has been no follow-up medical treatment regarding the headaches or alternative management strategies.

Petitioner's educational achievement and progress within the general education setting are commensurate with her expected academic abilities and standardized assessments of her abilities.

Since January of 2000, the Petitioner has had the following evaluations conducted, several in response to specific concerns of the Parents:

1. An evaluation by an ophthalmologist.
2. Evaluations by the Respondents to include:
  - a. Woodcock-Johnson Psychoeducational Battery Test of Achievement-Revised.
  - b. Wechsler Individual Achievement Test.
  - c. Peabody Individual Achievement Test-Revised.
  - d. Basic Achievement Skills Individual Screener.
  - e. Adaptive Behavior Inventory (Short Form).
  - f. Weschsler Intelligence Scale for Children—Third Edition.
  - g. Oral and Written Language Scales.
  - h. Clinical Evaluation of Language Fundamentals—3 (receptive subtests).
  - i. Differential Abilities Scale.
3. By Respondents:
  - a. Parent Interview.
  - b. Social and Developmental History.
  - c. Student Interview.
  - d. Elementary Teacher Reports.
  - e. Special Education Teacher Report (Classroom Observation).
4. By Respondents: Consultation with Petitioner’s optometrist by Consultant for Visually Impaired.
5. By Outreach Teacher from the Indiana School for the Blind: Observation, consultation, and Functional Vision Assessment.
6. By Independent Evaluator:
  - a. Beery Developmental Test of Visual-Motor Integration.
  - b. Peabody Picture Vocabulary Test-Revised.
  - c. Kaufman Test of Educational Achievement.
  - d. Woodcock-Johnson Tests of Achievement—R.
  - e. Wide Range Achievement Test—R3.
  - f. Revised Children’s Manifest Anxiety Scale.
  - g. Conners’ Parent Rating Scale—R—Long Version.
  - h. Conneres’ Continuous Performance Test—Reivsed.
  - i. Stroop Color & Word Test.
  - j. Trail Making Tests A & B.

The IHO found that the evaluators were qualified to conduct the assessments they performed. Petitioner did not appear to have any difficulty in seeing test materials and did not show any signs of visual or other discomfort during the testing process. Although the examination performed by the ophthalmologist could have been more thorough, “there was no evidence to indicate that [the examination] was professionally substandard.”

Respondents’ doctor concluded that Petitioner is nearsighted with moderate myopia but did not include information regarding the etiology and prognosis of the visual

dysfunction, secondary or accompanying visual conditions, or near/distance uncorrected acuity measures for right, left, and both eyes. The doctor did not provide a written diagnostic statement describing any health impairment (other than “moderate myopia”

Based on the foregoing, the IHO concluded the Petitioner does not have a “visual impairment” that is adversely affecting her educational performance. “At the present time, with best correction, the child’s vision is virtually normal.” The Petitioner is able to benefit educationally from her general education placement. In addition, the Petitioner’s headaches have not been so debilitating as to adversely affect her educational performance. She does not have a chronic or acute health problem that limits her strength, vitality, or alertness such that she would be considered to have an “Other Health Impairment” under Article 7.

The Petitioner’s conditions do not substantially limit a major life activity, such as learning or seeing. Although Petitioner’s headaches may occasionally affect her learning for a brief period of time, there is no evidence that such occasional episodes constitute a “substantial limitation.” Accordingly, the IHO determined Petitioner is not considered a qualified person with a disability under Sec. 504.

The IHO also concluded that the evaluations conducted by the Respondents, or on behalf of the Respondents, were conducted by persons qualified to do so and were appropriate to address the areas of suspected disabilities as well as to address specific concerns of the Parents.

Although the IHO had found for the Respondents on the four issues for hearing, the IHO nonetheless issued orders requiring the Respondents to develop a procedure for ensuring that evaluators performing assessments or examinations on behalf of Respondents have available to them information that may affect the reliability or validity of the assessment or examination that may be performed, and to ensure that such assessments or examinations meet the requirements of Article 7.

## **Appeal To The Indiana Board Of Special Education Appeals**

### **Petition for Review**

Petitioner filed on October 27, 2000, a Petition for Review with the Indiana Board of Special Education Appeals (BSEA). Petitioner asserts that the headaches are more debilitating than the IHO described in her decision, resulting in missed school days. Absences have been reportedly more frequent following the issuance of the IHO’s written decision. Petitioner also alleges that the “visual breaks” have not occurred, and that the very need for same indicates “limited strength” for OHI purposes. Petitioner also asserted that she has constant minor headaches and that testimony centered only on the severe headaches. Petitioner also acknowledges that the severe headaches are preventable and that she performs better academically than would be otherwise predicted.

The evaluations conducted by or on behalf of the Respondents allegedly did not adequately address the Parents' area of concern ("written language communication impairment"). Although Petitioner does not dispute that the assessments were performed by properly licensed individuals, Petitioner takes exception to a finding that the assessments were adequate to address "written language communication impairment" or that the speech-language pathologist was qualified to conduct the assessment because the speech-language pathologist ceased the administration of the written language test prior to its conclusion.

Although the IHO found that the Respondents' doctor conducted an examination and issued a report that did not address critical areas necessary for a determination of "Other Health Impairment," the IHO excuses these lapses. Petitioner asserts that such an inadequacy should not weigh against the Petitioner but against the Respondents. If the Respondents had the burden of proof, Petitioner argues, how did Respondents demonstrate that Petitioner's headaches do not adversely affect educational performance if their medical information is inadequate? Petitioner, in the alternative, states that she provided adequate information from her witnesses and documents to sustain a finding that her headaches do, in fact, adversely affect her educational performance.

Respondents, on November 2, 2000, timely requested an extension of time within which to respond to the Petition for Review. Such request was based on the continuing illness of Respondents' counsel. The BSEA granted the request that same date, issuing an Order extending the deadline for responding to November 20, 2000, and the deadline for conducting a review and issuing a written decision to December 11, 2000. Thereafter, on November 13, 2000, the Indiana Department of Education, Legal Section, provided copies of the record to each member of the BSEA.

### **The Response to the Petitioner for Review**

The Respondents filed on November 17, 2000, their Response to the Petition for Review. Respondents assert that Petitioner has received preferential seating, and that her testimony indicates that all of her seats have been assigned at the front of the class for the 2000-2001 school year. She also testified that since she has been assigned seating in the front of the class, her headaches have not been bad. The source of Petitioner's severe headaches has been attributed by Petitioner's Parent to changes in prescription eyeglasses and not necessarily to seating location in the classroom. The "visual hygiene" breaks, the Respondents assert, are being provided in accordance with the initial recommendations from Petitioner's optometrist (three-to-five minute break after 15-to-20 minutes of sustained close work, including reading). Respondents also represent that, contrary to Petitioner's claims of frequent absences recently due to severe headaches, Petitioner has only missed one day of school due to headaches. Respondents note that the Petitioner admits the severe headaches are preventable but has not sought any alternative medical strategies after determining analgesic tablets would not be effective due to Petitioner's vomiting of same. Respondents argue that it is employing the identified strategies in the classroom designed to assist in preventing the headaches.

Respondents claim that the record supports that it provided multiple assessments of written language proficiency, contrary to Petitioner's assertions. Respondent also represents that the

evaluations were conducted by persons with the requisite qualifications who complied with the requirements for the assessments administered.

Respondents acknowledge the IHO found deficiencies in the report from the ophthalmologist. However, the IHO utilized information from a variety of other sources in the record, including the Petitioner's optometrist, to address the core issues raised by the Parents: whether the Petitioner's visual difficulties were adversely affecting her educational performance due to fatigue, the amount of reading causing eye strain, and the effects this may have upon Petitioner's eye condition. There was sufficient information from a variety of sources, the Respondents state, when the case conference committee met in July of 2000 and determined Petitioner did not have a visual impairment nor was she OHI. The IHO received and considered the same information.

### **Response to Response**

Although Petitioner did not seek leave of the BSEA to do so, On November 27, 2000, Petitioner filed what may be styled as a "Response to the Respondents' Response." Respondents objected that same date to the submission to the BSEA of Petitioner's "Response." Because the record had already been transmitted to the BSEA and, as noted *infra*, a review date established, the BSEA took under advisement the objections of the Respondents and will decide on the day of review whether to accept the "Response."

### **Review by the Indiana Board of Special Education Appeals**

The BSEA, pursuant to 511 IAC 7-30-4(j), decided to review this matter without oral argument and without the presence of the parties. All parties were so notified by "Notice of Review Without Oral Argument," dated November 14, 2000. Review was set for December 4, 2000, in Indianapolis, in the offices of the Indiana Department of Education.

All three members of the BSEA appeared on that date. After review of the record as a whole and in consideration of the Petition for Review, the Response thereto, and the subsequent submissions of the parties, the BSEA makes the following determinations.

#### COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Board of Special Education Appeals, as established by 511 IAC 7-30-4, reviews the final written decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-30-3. Although the instant matter involves an issue as to whether the Petitioner is a qualified person with a disability under Sec. 504, the issue is one of several others, the remaining issues all derivative from Article 7. The BSEA has jurisdiction to review such matters where Article 7 is implicated. For Sec. 504 purposes, these procedures constitute satisfaction of the due process hearing requirements stated at 34 CFR §104.36. The BSEA has jurisdiction in this matter.
2. Petitioner challenges the IHO's Finding of Fact *F I.3*, which reads: "The adaptations to the child's general education, namely the "visual hygiene" breaks and preferential

seating, allow the child to see visual presentations without significant difficulty. These adaptations prevent most headaches, except those resulting from the period when she is adjusting to new prescription lenses.” Although the record indicates that there has been some inconsistency in the past on the part of the Respondents in ensuring these accommodations are provided to Petitioner, testimony is that this year the accommodation is being provided. Assessment of credibility is within the province of the IHO. The record supports this Finding by the IHO. In addition, the fact that “visual hygiene” breaks are provided as an accommodation for the Petitioner are not, in and of themselves, an indication that the student has “limited strength” under the Article 7 definition for “Other Health Impairment.” 511 IAC 7-26-12(a). There is no showing that the Petitioner’s condition “adversely affects educational performance” as that term is defined at 511 IAC 7-17-4 and applied to the OHI criteria.

3. Petitioner objects to the IHO’s Finding of Fact *F 1.4*, which reads: “The child reported having only one headache during the first month of the current school year (2000-2001). Her mother reported numerous, severe headaches this school year. Whatever the exact frequency of these headaches, there have been fewer problems this school year than during the past years.” Although Petitioner reported more than one headache, the IHO was referring contextually to *severe* headaches. The record sustains this Finding of Fact. The Parent did testify that there were numerous severe headaches during the previous school year, but this was during the time that implementation of the GEI plan was erratic. The IHO correctly noted that, the frequency of such severe headaches notwithstanding, there are fewer incidents this school year. This is not altered by the Petitioner’s assertion that there have been numerous absences since the issuance of the IHO’s written decision. The Respondents have countered that school records show there has been but one absence attributable to a severe headache.
4. Petitioner takes exception to the IHO’s Finding of Fact *F 1.5*, which reads: “The child has never sought medication or attention from school staff, and she has not left school as a result of her headaches.” Although Petitioner takes exception to this Finding, she does not disagree with it. Accordingly, the Finding is sustained.
5. Petitioner also objects to the IHO’s Finding of Fact *F 1.6*, which reads: “The child’s pediatrician has suggested over-the-counter analgesics for pain management, when necessary. The parents reported that the child vomits up analgesic tablets, but that she has received no other follow-up medical treatment to relieve the headaches.” This Finding is based on the record and is not otherwise contradicted. No follow-up medical treatment or advice has been sought. In addition, there is no evidence as to why analgesics in powder form and mixed with a beverage or other food would not suffice. The Finding is sustained.
6. Petitioner takes exception to the IHO’s Finding of Fact *F 1.7*, which reads: “The child’s educational achievements and progress in her regular educational setting are commensurate with the results of the standardized testing of her abilities.” Petitioner’s exception stems from Petitioner’s misunderstanding of standardized assessment. Even assuming that standardized assessment predicts Petitioner should earn only “C” grades,

Petitioner asserts that she is earning A's and B's with apparently little effort. This is not indicative of the "severe specific deficit" in written language that would indicate the presence of a specific learning disability under 511 IAC 7-26-8. The IHO's Finding is sustained.

7. Although Petitioner objects to the IHO's Finding of Fact *F 4.3* ("Several of the tests listed above were performed in response to the specific concerns of the parents"), the record indicates that this was the case. The Finding is sustained.
8. Petitioner objects to the IHO's Finding of Fact *F 4.4*, which reads: "The persons performing the evaluations of the child were qualified to perform the test(s) they administered." The record indicates the qualifications of the various evaluators, both medical and educational. There is no indication that Respondents did not comply with 511 IAC 7-25-3(e) in the selection and utilization of assessment instruments.
9. Petitioner also objects to the IHO's Finding of Fact *F 4.7* regarding the inadequacy of the evaluation conducted for the Respondents by the ophthalmologist. There is no dispute among the parties or the IHO that the ophthalmologist's report did not address all areas required for such a medical evaluation for a visual impairment under 511 IAC 7-26-14(b)(8)(A)-(E). However, this subsection does not require that the report issue only from an ophthalmologist. An optometrist can also supply the needed information for consideration by a student's case conference committee. In this situation, the Petitioner's optometrist had supplied information that, when considered with the report of the ophthalmologist, satisfies the requirements of this subsection. Petitioner also opines how a layperson can understand and apply incomplete medical information. Laypersons, as distinguished from medical practitioners, constitute case conference committees. They are called upon to make educational decisions, not medical ones, and accomplish this on a regular basis. Educational decisions are made by case conference committees and are not dictated by medical practitioners. See 511 IAC 7-26-14(b).
10. Petitioner objects to the IHO's Conclusion of Law *C 1.1*, which found that it did not matter who bore the initial burden of proof when considering eligibility under Article 7 or, in the alternative, Sec. 504. The IHO concluded the result would be the same: Petitioner is not a student with a disability for Article 7 purposes and does not qualify as a person with a disability for Sec. 504 purposes. The record supports this Conclusion. It is, therefore, sustained.
11. Finally, Petitioner objects to the IHO's Conclusion of Law *C 1.2*, which found the Petitioner does not have a visual impairment, as defined by 511 IAC 7-26-14. The IHO found that, with correction, the Petitioner's vision is "virtually normal." Petitioner does not disagree with this. Accordingly, the IHO's Conclusion is sustained.

## ORDERS

In consideration of the foregoing, the Board of Special Education Appeals now issues the following Orders:

1. Petitioner's "Response to the Respondents' Response" is merely cumulative and redundant. To the extent that it attempts to raise issues not presented in the original Petition for Review, the "Response" will not be accepted. The Respondents' Objection will be sustained.
2. The IHO's decision is based upon the record as a whole, including the documentary evidence and testimony supplied by the parties. The IHO correctly applied the provisions of Article 7. The IHO's decision is upheld in its entirety.
3. Any other motions not addressed specifically in this opinion are hereby deemed to be overruled or denied.

Date: December 4, 2000

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Richard Therrien, Chair  
Board of Special Education Appeals

#### **APPEAL STATEMENT**

Any party aggrieved by the decision of the Board of Special Education Appeals has thirty (30) calendar days from the receipt of this written decision to request judicial review in a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5.